

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHANE G. NOVOTNEY,)	
)	No. CV-09-0318-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on August 27, 2010. (Ct. Rec. 14, 16). Plaintiff Shane G. Novotney ("Plaintiff") filed a reply brief on August 12, 2010. (Ct. Rec. 18). Attorney Maureen Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have filed a consent to proceed before a magistrate judge. (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14).

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits ("DIB") and an application for Supplemental Security Income ("SSI") benefits on April 24, 2007, alleging disability

1 since June 20, 1994.¹ The applications were denied initially and
2 on reconsideration. Administrative hearings were held before
3 Administrative Law Judge ("ALJ") Paul L. Gaughen on March 24, 2009
4 and May 13, 2009. (AR 29-93). On June 4, 2009, the ALJ issued a
5 decision finding that Plaintiff was not disabled. (AR 76-88).
6 The Appeals Council denied Plaintiff's request for review on
7 September 24, 2009. (AR 1-3). Therefore, the ALJ's decision
8 became the final decision of the Commissioner, which is appealable
9 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
10 filed an action for judicial review pursuant to 42 U.S.C. § 405(g)
11 on October 19, 2009. (Ct. Rec. 2).

12 STATEMENT OF FACTS

13 The facts have been presented in the administrative hearing
14 transcripts, the ALJ's decisions, and the parties' briefs and will
15 only be summarized here. Plaintiff was 31 years old on October 1,
16 2005, the alleged onset date. Plaintiff stopped attending school
17 in the seventh grade. Plaintiff has also not received his GED.
18 Plaintiff's past work experience includes work as a kitchen
19 helper, a cook helper, a fast foods worker, and a maid or
20 housekeeping cleaner. (AR 91). Plaintiff alleges disability as
21 of October 1, 2005, due to "mental disorders" and ailing physical
22 health. (AR 61).

23 SEQUENTIAL EVALUATION PROCESS

24 The Social Security Act (the "Act") defines "disability" as
25 the "inability to engage in any substantial gainful activity by
26 reason of any medically determinable physical or mental impairment
27

28 ¹At the administrative hearing held on May 13, 2009,
Plaintiff amended his onset date to October 1, 2005. (AR 33).

1 which can be expected to result in death or which has lasted or
2 can be expected to last for a continuous period of not less than
3 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
4 Act also provides that a Plaintiff shall be determined to be under
5 a disability only if his impairments are of such severity that
6 Plaintiff is not only unable to do his previous work but cannot,
7 considering Plaintiff's age, education and work experiences,
8 engage in any other substantial gainful work which exists in the
9 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
10 Thus, the definition of disability consists of both medical and
11 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
12 (9th Cir. 2001).

13 The Commissioner has established a five-step sequential
14 evaluation process for determining whether a person is disabled.
15 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
16 engaged in substantial gainful activities. If he is, benefits are
17 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
18 decision maker proceeds to step two, which determines whether
19 Plaintiff has a medically severe impairment or combination of
20 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

21 If Plaintiff does not have a severe impairment or combination
22 of impairments, the disability claim is denied. If the impairment
23 is severe, the evaluation proceeds to the third step, which
24 compares Plaintiff's impairment with a number of listed
25 impairments acknowledged by the Commissioner to be so severe as to
26 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
27 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
28 meets or equals one of the listed impairments, Plaintiff is

1 conclusively presumed to be disabled. If the impairment is not
2 one conclusively presumed to be disabling, the evaluation proceeds
3 to the fourth step, which determines whether the impairment
4 prevents Plaintiff from performing work he has performed in the
5 past. If Plaintiff is able to perform his previous work, he is
6 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
7 cannot perform this work, the fifth and final step in the process
8 determines whether Plaintiff is able to perform other work in the
9 national economy in view of his residual functional capacity and
10 his age, education and past work experience. 20 C.F.R. §§
11 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

12 The initial burden of proof rests upon Plaintiff to establish
13 a *prima facie* case of entitlement to disability benefits.
14 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
15 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
16 met once Plaintiff establishes that a physical or mental
17 impairment prevents him from engaging in his previous occupation.
18 The burden then shifts to the Commissioner to show (1) Plaintiff
19 can perform other substantial gainful activity and (2) a
20 "significant number of jobs exist in the national economy" which
21 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
22 Cir. 1984).

23 STANDARD OF REVIEW

24 Congress has provided a limited scope of judicial review of a
25 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
26 the Commissioner's decision, made through an ALJ, when the
27 determination is not based on legal error and is supported by
28 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995

1 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
2 1999). "The [Commissioner's] determination that a plaintiff is
3 not disabled will be upheld if the findings of fact are supported
4 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
5 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
6 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
7 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
8 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
9 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
10 573, 576 (9th Cir. 1988). Substantial evidence "means such
11 evidence as a reasonable mind might accept as adequate to support
12 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
13 (citations omitted). "[S]uch inferences and conclusions as the
14 [Commissioner] may reasonably draw from the evidence" will also be
15 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
16 On review, the court considers the record as a whole, not just the
17 evidence supporting the decision of the Commissioner. *Weetman v.*
18 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
19 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

20 It is the role of the trier of fact, not this court, to
21 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
22 evidence supports more than one rational interpretation, the court
23 may not substitute its judgment for that of the Commissioner.
24 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
25 (9th Cir. 1984). Nevertheless, a decision supported by
26 substantial evidence will be set aside if the proper legal
27 standards were not applied in weighing the evidence and making the
28 decision. *Browner v. Secretary of Health and Human Services*, 839

1 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
2 evidence to support the administrative findings, or if there is
3 conflicting evidence that will support a finding of either
4 disability or nondisability, the finding of the Commissioner is
5 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
6 1987).

7 **ALJ'S FINDINGS**

8 The ALJ found at step one that Plaintiff has not engaged in
9 substantial gainful activity since the amended alleged onset date.
10 (AR 78). At step two, the ALJ determined that Plaintiff had the
11 severe impairments of borderline intellectual functioning and
12 diabetes mellitus. (AR 78-79).

13 At step three, the ALJ concluded that Plaintiff does not have
14 an impairment or combination of impairments that meets or
15 medically equals a Listings impairment. (AR 79-80). The ALJ
16 found that Plaintiff had the residual functional capacity ("RFC")
17 to perform a full range of work at all exertional levels. (AR
18 80). However, he indicated that Plaintiff would have the
19 following nonexertional limitations: (1) Plaintiff can read,
20 understand, and apply 1 to 3 step instructions; however, he would
21 have moderate delays in learning instructions involving 4 or more
22 steps; (2) Plaintiff could not persistently do work requiring
23 significant higher level or sophisticated level of social
24 interaction, including collaborative endeavor with coworkers and
25 others, but he can engage in perfunctory interaction, including
26 greeting the retail public; (3) Plaintiff can do basic work
27 activities, except those requiring the ability to adapt to
28 significant changes in the work setting, work requiring Plaintiff

1 to set his own schedule, and work requiring unusual work stressors
2 such as traveling extensively on his own or engaging in extensive
3 customer contacts in a retail-type setting; and (4) Plaintiff can
4 meet basic work requirements with a well learned routine, a
5 predictable work setting, and where occasional demonstrations of
6 difficulty or attention getting behavior will not distract other
7 from their endeavors.

8 At step four of the sequential evaluation process, the ALJ
9 determined that Plaintiff could perform his past relevant work as
10 a cleaner housekeeping and kitchen helper. (AR 87). Accordingly,
11 the ALJ determined at step four of the sequential evaluation
12 process that Plaintiff was not disabled within the meaning of the
13 Social Security Act. (AR 76-88).

14 ISSUE

15 Plaintiff argues that he was more limited from a
16 psychological standpoint than as determined by the ALJ. (Ct. Rec.
17 15 at 12-20).

18 DISCUSSION

19 Plaintiff asserts that the ALJ failed to properly evaluate
20 the medical evidence of record with respect to his mental health.
21 Plaintiff contends, without specificity, that his severe mental
22 impairments include more than just borderline intellectual
23 functioning, and that the ALJ erred by rejecting the opinions of
24 Drs. Mabee and Brown and not properly considering the opinions of
25 the medical expert, Dr. McKnight. (Ct. Rec. 15 at 12-20; Ct. Rec.
26 18). The Commissioner responds that the ALJ appropriately
27 evaluated the medical evidence of record and properly concluded,
28 at step four, that Plaintiff was not disabled. (Ct. Rec. 17).

1 **A. Severe Impairments**

2 The regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c),
3 provide that an impairment is severe if it significantly limits
4 one's ability to perform basic work activities. An impairment is
5 considered non-severe if it "does not significantly limit your
6 physical or mental ability to do basic work activities." 20
7 C.F.R. §§ 404.1521, 416.921. Plaintiff has the burden of proving
8 that he has a severe impairment. 42 U.S.C. § 423(d)(1)(A); 20
9 C.F.R. § 423(d)(1)(A), 416.912. In order to meet this burden,
10 Plaintiff must furnish medical and other evidence that shows that
11 he is disabled. 20 C.F.R. § 416.912(a). In the absence of
12 objective evidence to verify the existence of an impairment, the
13 ALJ must reject the alleged impairment at step two of the
14 sequential evaluation process. SSR 96-4p.

15 Plaintiff has at no time alleged a specific severe mental
16 impairment; not at the time of his application for benefits, not
17 at the time of his administrative hearing, and not on review
18 before this Court. Plaintiff has merely alleged that he is
19 disabled due to "mental disorders" and ailing physical health.
20 (AR 61). Therefore, Plaintiff has not specifically identified an
21 alleged severe mental impairment for the Court to consider.

22 In this case, the ALJ concluded that Plaintiff has the severe
23 mental impairment of borderline intellectual functioning. (AR 78-
24 79). The ALJ evaluated the evidence of record, considered the
25 hearing testimony of Plaintiff and the medical expert and
26 concluded that Plaintiff did not have any other severe, medically
27 determinable mental impairments. In making this conclusion, the
28 ALJ determined that Plaintiff's statements concerning the

1 intensity, persistence and limiting effects of his symptoms were
2 not credible to the extent they were inconsistent with the ALJ's
3 RFC assessment. This credibility determination is not challenged
4 by Plaintiff on appeal.

5 The ALJ's step two determination, that Plaintiff has the
6 severe mental impairment of borderline intellectual functioning,
7 is supported by the substantial weight of the record evidence.
8 The record does not demonstrate that Plaintiff has other specific
9 mental impairments which significantly limit his ability to do
10 basic work activities.

11 **B. Physician Opinions**

12 The ALJ found that while Plaintiff has borderline
13 intellectual functioning, he is able to perform basic mental work
14 activities such as understanding, remembering and carrying out
15 simple instructions; making simple, work-related decisions; and
16 responding appropriately to supervisors, co-workers, and usual
17 work situations. (AR 81). In making this determination, the ALJ
18 indicated that the record shows Plaintiff has repeatedly
19 exaggerated his symptoms during examinations. (AR 82). As noted
20 above, the ALJ's credibility determination is not challenged in
21 this case.

22 On April 25, 2006, Plaintiff was evaluated by Abrigail
23 Osborne-Elmer, M.S., under the supervision of Dr. Kayleen Islam-
24 Zwart, Ph.D. (AR 225-234). Plaintiff was diagnosed with
25 malingering with a possible diagnosis of borderline intellectual
26 functioning. (AR 226). Plaintiff's performance on the Trail
27 Making Tests were likely due to malingering, and the results of
28 the MMPI-2 suggested his profile was invalid due to over reporting

1 psychopathology. (AR 231-232). The results of the MACE test
2 indicated he was purposefully attempting to appear impaired and
3 the Rey Fifteen Item Memory Test was indicative of memory
4 malingering. (AR 233). It was noted that his results could not
5 be interpreted due to malingering. (AR 233, 234).

6 On May 19, 2007, Plaintiff was examined by Dr. Debra Brown,
7 Ph.D. (AR 235-243). Plaintiff was diagnosed with Dysthymia,
8 Anxiety, NOS, Borderline Intellectual Functioning, and Personality
9 Disorder, NOS, antisocial. (AR 236, 242). The PAI indicated a
10 possible exaggeration of complaints and problems, but not to the
11 extent that the test results could not be interpreted. (AR 240).
12 Dr. Brown indicated that Plaintiff "has demonstrated he can work in
13 a very minimally skilled job such as washing dishes or perhaps
14 preparing items to be cooked in a restaurant." (AR 243).
15 Nevertheless, Dr. Brown opined that it was unlikely that Plaintiff
16 will hold down any permanent employment. *Id.*

17 On June 26, 2007, Dr. James Bailey, Ph.D., reviewed the
18 record and filled out a Psychiatric Review Technique form. (AR
19 244-257). Dr. Bailey noted a dysthymic disorder, borderline IQ,
20 Anxiety NOS, and antisocial personality disorder. (AR 247-251).
21 He found Plaintiff to have mild restriction of activities of daily
22 living, moderate difficulties in maintaining social functioning,
23 and moderate difficulties in maintaining concentration,
24 persistence or pace. (AR 254). However, Dr. Bailey opined that
25 Plaintiff could do simple repetitive tasks, concentrate on
26 concrete tasks, work around others but not with high levels of
27 cooperation, have superficial public and coworker contact, and
28 respond to simple goals set by others. (AR 260). On September

1 27, 2007, Dr. Edward Beaty, Ph.D., reviewed the file and concurred
2 with Dr. Bailey's June 26, 2007 findings. (AR 331).

3 On June 10, 2008, Plaintiff was again examined by Dr. Brown.
4 (AR 333-342). Plaintiff was diagnosed with Post-traumatic Stress
5 Disorder, Dysthymic Disorder, Alcohol Dependence, sustained full
6 remission, by self report, and Personality Disorder, NOS, with
7 antisocial features. (AR 342). Again, the PAI was invalid
8 showing an over-reporting of psychopathology and suggesting
9 symptom exaggeration. (AR 342). The doctor indicated that
10 despite Plaintiff's level of intelligence, "many individuals with
11 this level of intelligence are capable of gainful employment."
12 (AR 342). He stated that "[a]llthough a year ago, it appeared that
13 Mr. Novotney was permanently disabled, this time, with the invalid
14 PAI we have some question as to the validity of his complaints."
15 (AR 342). Dr. Brown opined there was insufficient evidence to
16 show that Plaintiff was unemployable.

17 On August 4, 2008, Plaintiff was evaluated by Amy Robinson,
18 M.S., under the supervision of Dr. W. Scott Mabee, Ph.D. (AR 437-
19 448). Plaintiff indicated he last used alcohol and marijuana two
20 months prior to the evaluation. (AR 443). It was noted that the
21 PAI was administered with test results potentially involving
22 considerable distortion. (AR 444). Nevertheless, Plaintiff was
23 diagnosed with Major Depressive Disorder, Recurrent, Severe with
24 Psychotic Feature, in remission and controlled with medication;
25 Alcohol Dependence, Early Full Remission/Cannabis Abuse, Early
26 Full Remission; Anxiety Disorder, NOS; and Personality Disorder,
27 NOS with Borderline and Antisocial Features/Borderline
28 Intellectual Functioning. He was given a GAF score of 55 to 60,

1 suggesting he was having moderate difficulties interacting
2 appropriately and meaningfully with others. (AR 445).

3 Dr. R. Thomas McKnight, Ph.D., testified as a medical expert
4 at the administrative hearing held on May 13, 2009. (AR 36-59).
5 Dr. McKnight indicated that testing suggested Plaintiff was
6 functioning within the borderline range for measured intellectual
7 ability. (AR 36). He stated that malingering and invalid test
8 results were referred to repeatedly in the record. Dr. McKnight
9 testified that Plaintiff is "clearly overstating the difficulty in
10 a variety of areas." (AR 44). He agreed that Plaintiff was not
11 likely to hold down permanent employment, but qualified the
12 opinion by indicating "not that he can't, it's just that he's not
13 likely to." (AR 52-53). With respect to Dr. Mabee's report, Dr.
14 McKnight testified that he disagreed with many of the findings,
15 because it did not address the issue of the invalid PAI, which is
16 grossly overstating pathology while significantly understating
17 competency, and states that Plaintiff has difficulty following one
18 or two step instructions, while Plaintiff had to follow two and
19 three step instructions throughout that examination. (AR 56-57).

20 The ALJ is responsible for reviewing the evidence and
21 resolving conflicts or ambiguities. *Magallanes*, 881 F.2d at 751.
22 If evidence supports more than one rational interpretation, the
23 Court must uphold the decision of the ALJ. *Allen*, 749 F.2d at
24 579. It is the role of the trier of fact, not this Court, to
25 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The
26 Court may not substitute its own judgment for that of the ALJ even
27 if it might justifiably have reached a different result upon de
28 novo review. 42 U.S.C. § 405(g).

1 The ALJ properly discounted the assessments of Dr. Brown.
2 (AR 86). With regard to the May 19, 2007 report, the ALJ
3 indicated that no consideration was given to the effects of
4 Plaintiff's substance abuse. Furthermore, the PAI results
5 indicated Plaintiff was exaggerating his symptoms, but no
6 consideration was given to the validity of Plaintiff's complaints.
7 (AR 86). As to Dr. Brown's June 10, 2008 report, Plaintiff's
8 invalid PAI was taken into consideration, and it was noted the
9 results of that test raised some questions as to the validity of
10 Plaintiff's complaints. With respect to this examination, it was
11 noted that there was insufficient evidence to show that Plaintiff
12 was unemployable. (AR 86).

13 The ALJ also properly discounted Dr. Mabee's report. (AR
14 87). The ALJ noted that, again, the invalid PAI score was not
15 considered. *Id.* The ALJ found that Plaintiff's reported symptoms
16 were not consistent with his treatment records which indicated
17 improvement of symptoms with treatment and medication. (AR 87).
18 The ALJ indicated that some of the symptoms reported to Dr. Mabee
19 were not reported elsewhere in the record, which further indicated
20 Plaintiff was exaggerating his symptoms in effort to obtain
21 benefits. (AR 87).

22 The ALJ instead relied on the opinion of Dr. Bailey, which
23 was affirmed by Dr. Beaty. (AR 85). Furthermore, Dr. Bailey's
24 opinion is consistent with the testimony of Dr. McKnight.
25 Contrary to Plaintiff's arguments, the record does not support
26 more restrictive psychological findings in this case. The ALJ's
27 RFC determination is in accord with the weight of the record
28 evidence. The ALJ appropriately evaluated the medical evidence of

1 record and properly concluded, at step four, that Plaintiff was
2 capable of performing his past relevant work.

3 **CONCLUSION**

4 This Court must uphold the Commissioner's determination that
5 Plaintiff is not disabled if the Commissioner applied the proper
6 legal standards and there is substantial evidence in the record as
7 a whole to support the decision. Having reviewed the record and
8 the ALJ's conclusions, the Court finds that the ALJ's decision is
9 supported by substantial evidence and free of legal error.
10 Plaintiff is thus not disabled within the meaning of the Social
11 Security Act. Accordingly,

12 **IT IS ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**)
14 is **DENIED**.

15 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**)
16 is **GRANTED**.

17 3. The District Court Executive is directed to enter
18 judgment in favor of Defendant, file this Order, provide a copy to
19 counsel for Plaintiff and Defendant, and **CLOSE** this file.

20 **IT IS SO ORDERED.**

21 **DATED** this 7th day of October, 2010.
22

23 S/James P. Hutton

24 JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE